WOO VAIN CHAN v. MALAYAWATA STEEL BHD

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: W-02-2288-10-2013]
15 FEBRUARY 2016

LABOUR LAW: *Employment – Redundancy – Decision of Industrial Court – Judicial review – Application for – Whether employee's services no longer required by company – Whether company acted bona fide in terminating employee's employment – Whether employee's dismissal without just cause and excuse – Whether case for redundancy established – Whether company bore burden to prove that case for redundancy established in order to justify dismissal of employee – Whether High Court Judge exceeded jurisdiction in quashing Industrial Court's award – Whether decision of Industrial Court should be reinstated – Bayer (M) Sdn Bhd v. Ng Hong Pau*

The appellant commenced employment with the respondent on 10 August 2000 as Vice President (Investment and General Affairs). In August 2001, the respondent revised its existing structure wherein the appellant, under this re-organisation, was re-designated to the position of Vice President (Plantation and Property Investment Division) who was responsible for the daily operations of the new plantation and property investment division. In addition, the appellant's main focus, where his personal attendance was required, was a set of tasks labelled under the heading 'special task'. The respondent realised that none of the special tasks which formed the bulk of the appellant's responsibilities had materialised. As a result, the respondent realised that the appellant's position was not warranted and justified since the work requirements were purely administrative and could easily be handled and performed by either a clerk or an agency. *Vide* letter dated 30 October 2002, the appellant was informed that his services were no longer required by the respondent. Pursuant to this letter of termination, the appellant was, nevertheless, accorded with a lump sum payment of RM60,000 which was inclusive of payment *in lieu* of notice as well as his accrued annual increment. Dissatisfied with his dismissal, the appellant filed a representation at the Industrial Relations Department under s. 20 of the Industrial Relations Act 1967. The Chairman of the Industrial Court ('CIC') decided in favour of the appellant and held, *inter alia*, that (i) the appellant's dismissal was without just cause and excuse; (ii) the company must act *bona fide* and not capriciously or with motive of victimisation or unfair labour practice; (iii) the respondent did not adduce any evidence to substantiate its averment that it was operating under a very challenging set of circumstances at the material time when it was dealing with difficulties posed by the reduction in demand for its products, weak collection and escalating costs; (iv) there was no evidence

adduced that the appellant was not able to fulfil what was required of him at the time of his retrenchment; (v) a substantial amount of the appellant's duties and responsibilities still existed at the time of the claimant's retrenchment; (vi) the dismissal was clearly an unfair labour practice; (vii) the case of retrenchment had not been made out on a balance of probabilities; and (viii) the respondent did not act *bona fide* in terminating the appellant's services. Aggrieved by this decision, the respondent filed a judicial review application in the High Court. The court quashed the decision of the Industrial Court. Hence, this appeal. It was argued that the CIC had considered the issues of redundancy, the right of the employer to manage its business as it deems fit in the circumstances of the case, the evidence as led by both parties and the issue of remedy or relief that ought to be meted out. Further, it was asserted that the High Court Judge had exceeded her jurisdiction as a review judge by substituting her own findings of facts in place of the CIC's findings.

Held (allowing appeal with costs; setting aside decision of the High Court and reinstating Industrial Court's Award)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The respondent had the burden to prove on the balance of probabilities that the case for redundancy was made out so as to justify the dismissal of the appellant from its employment. Otherwise, it would tantamount to unfair labour practice, thereby rendering the dismissal invalid and without lawful excuse. Merely by showing that the company was undergoing restructuring exercise would not suffice. It must be further exhibited through evidence that the exercise had impacted on the job function in such a manner that "it was reduced to such an extent that he was considered redundant". In other words, the exercise had rendered the employee a surplus to the manpower requirement of the company. If such a situation was successfully borne out by the evidence as led before the court, then an employee so affected could be validly retrenched or his services terminated on that ground (*Bayer (M) Sdn Bhd v. Ng Hong Pau*; refd). (paras 18 & 19)

(2) In a judicial review application, the High Court exercises a supervisory function as opposed to its appellate functions. The scope of supervisory role is of a much narrow import as compared to the appellate role. The findings of the CIC were all based on the evidence of witnesses called by both parties. It would require some strong findings to the contrary to displace what the CIC found as having been proven and unproven, pertaining to the various allegations of facts, in order to quash the award. It had not been articulated that the said award was such a perverse decision which no reasonable tribunal similarly circumstanced would have arrived at. The award of the CIC did not suffer from any of the defects identified in *Council of Civil Service Unions & Ors v. Minister for the*

Civil Service and neither did it transgress the unreasonableness test as expounded in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*. (paras 31, 33 & 35)

(3) There were merits in the complaints submitted by the appellant against the decision of the High Court Judge when the order of *certiorari* to quash the CIC's award was issued. There was no redundancy in the respondent company so as to justify his dismissal on the stated ground of redundancy. There was a lack of *bona fide* when the company dismissed the appellant. In the circumstances, the High Court Judge exceeded her jurisdiction in quashing the award. (paras 37 & 38)

Case(s) referred to:

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Bayer (M) Sdn Bhd v. Ng Hong Pau [1999] 4 CLJ 155 CA ***(refd)***

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Stephen Bong v. FCB (M) Sdn Bhd & Anor [1999] 1 LNS 131 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20

Other source(s) referred to:

Industrial Relations in Malaysia, 3rd edn, pp 255 & 256

For the appellant - Anand Ponnudurai & Charles Chong Tet Hong; M/s Bodipalar Ponnudurai De Silva

For the respondent - Vijayan Venugopal & Jamie Goh Moon Hoong; M/s Shearn Delamore & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: R2-25-71-04-2013 (overruled).]

Reported by Kumitha Abd Majid

JUDGMENT

Abang Iskandar JCA:

Factual Background Of The Case

[1] Woo Vain Chan ("the appellant") commenced employment with Malayawata Steel Berhad (currently known as Ann Joo Steel Berhad) ("the respondent") on 10 August 2000 as Vice President (Investment and General Affairs).

[2] The respondent had investments in areas such as properties and palm oil estates.

[3] In August 2001, the respondent revised its existing structure wherein the appellant, under this reorganisation, was redesignated to the position of Vice President (Plantation and Property Investment Division) ("PPID") who was responsible for the daily operations of the new plantation and property investment division. In addition, the appellant's main focus where his personal attendance was required was a set of tasks labelled under the heading "special task".

[4] Later, the respondent realised that none of the special tasks which formed the bulk of the appellant's responsibilities had in fact materialised. The respondent's investment in oil palm estate and properties did not have a competitive advantage in the above two sectors as it did not experience the benefits of economies of scale and also because it did not have the necessary expertise in the above two sectors.

[5] In view of the foregoing work requirement which the PPID performed, the respondent realised that the appellant's position as Vice President was not warranted and justified as the work requirements were purely administrative and could easily be handled and performed by either a clerk or an agency.

[6] *Vide* letter dated 30 October 2002, the appellant was informed that his services were no longer required by the respondent. Prior to this, the appellant was offered a voluntary separation scheme which was rejected by the appellant. Pursuant to the letter of termination, the appellant was nevertheless accorded with a lump sum payment of RM60,000 which was inclusive of payment *in lieu* of notice as well as his accrued annual increment.

[7] The appellant, being dissatisfied with his dismissal, had then filed a representation at the Industrial Relations Department under s. 20 of the Industrial Relations Act 1967 which subsequently referred the representation to the Industrial Court ("the IC").

[8] The Chairman of the IC ("CIC") in Award No 16 of 2013 dated 3 January 2013 ("the said award") decided in favour of the appellant in ruling that the dismissal of the appellant was without just cause and excuse. The CIC thereafter ordered the respondent to pay the appellant back wages and compensation *in lieu* of reinstatement in the total sum of RM193,000.

[9] Aggrieved by the decision, the respondent filed an application for judicial review ("JR") to the High Court to quash the said award.

[10] The learned High Court Judge ("HCJ") on 9 September 2013 allowed the respondent's application for an order of *certiorari* to quash the decision of the IC with costs. Thus, this appeal before us by the appellant.

The Appeal

[11] We had heard the appeal and heard submissions by both learned counsel. We had sighted the records of appeal. From a perusal of the memorandum of appeal, the appellant contended, *inter alia*, that the learned HCJ erred in laws and/or facts when:

(a) interfering with the finding of fact made by the CIC that;

(i) the dismissal of the appellant was without just cause and excuse;

(ii) the dismissal of the appellant was not *bona fide* since the appellant's position and function were still in existence; and

(iii) the appellant's duties were taken over by the other employees.

(b) substituting the decision of the CIC with an irrational and/or illogical decision;

(c) substituting the decision of the CIC even though the CIC had sufficient grounds based on the evidence before it during the trial to reach into the said award;

(d) substituting the decision of the CIC even though there is no error in facts or in the reasoning process before reaching into the award;

(e) usurping the function of the CIC by substituting the said award with her own decision;

(f) she ought to have decided that the findings of fact made by the CIC was supported with sufficient evidence, and therefore should be sustained;

(g) she failed to consider that there are no irregularities in the process of decision-making made by the CIC and therefore the said award is reasonable and far from any error;

(h) acted beyond her jurisdiction by using the appellate jurisdiction instead of judicial review; and

(i) she ought to have found that the CIC had taken into consideration relevant factors and disregard the irrelevant ones in awarding the said award.

[12] As to the reason for the termination, namely redundancy/surplus to requirement leading to retrenchment, it was contained in the letter of termination issued by the respondent employer. The relevant part of that letter reads as follows:

> the work requirement in the property field was insufficient to optimally utilise the Claimant's skills and functions. After examination of the work demands of PPID, it was clear that there was insufficient work to justify the continuation of the PPID. As such, the Company had no alternative but to effect the closure of PPID soon.

[13] As the appellant was basically in charge of the PPID, the alleged imminent closure of the PPID would therefore inevitably impact on the relevancy of his continued employment with the respondent. Indeed, it was the professed stand of the respondent that the appellant had been rendered redundant as a result of such an impending move by the company.

[14] It was submitted before us by learned counsel for the appellant that the central issue in this appeal must be the issue of whether the dismissal of his client had been done with lawful excuse. He submitted that the learned CIC had correctly arrived at her decision in handing down the award favouring the appellant. It was submitted as well before us by learned counsel that the learned CIC had considered the issues of redundancy; the right of the employer to manage its business as it deems fit in the circumstances of the case; the evidence as led before her by both parties; and the issue of remedy or relief that ought to be meted out. As to his complaint against the learned HCJ's decision, it was impressed upon us that the learned HCJ had exceeded her jurisdiction as a review judge, by substituting her own findings of fact in place of the learned CIC's findings of fact. It was the view of the appellant's counsel that the role of the High Court in cases of this nature is a more limited one, as compared to the role of the High Court exercising its appellate powers. In a case where, it had not been shown that the CIC has committed the fatal errors of illegality, irrationality or procedural impropriety, the award handed down by the CIC ought not to be interfered with by the High Court exercising its supervisory powers in a JR application.

[15] We were of the view that the learned CIC had set out the parameters correctly before she embarked on her task of determining whether the dismissal was justified. This had been a case of dismissal premised on redundancy.

[16] The law on redundancy as a ground for dismissal in industrial relations jurisprudence is rather settled. In this respect, it would be helpful by this court setting out how the law has attempted to give a definition to that term. A short reference to the authoritative book entitled "*Industrial Relations in Malaysia*" 3rd edn at pp. 255-256 would give us the manner as to how redundancy has been defined, as follows:

> Redundancy refers to a surplus of labour and is normally the result of a reorganisation of the business of an employer; and its usual consequence is retrenchment, ie, the termination by the employer of those employees found to be surplus to his requirements after the reorganisation. Thus, there must be redundancy or surplus of labour before there can be retrenchment or termination of the surplus.

[17] Another essential feature that needed to be considered in determining whether redundancy existed in an organisation, would be to see whether "the work continues to exist or whether the work although continuing to exist requires fewer employees to carry it out. The restructuring or reorganisation

that is carried out must result in redundancy, that is, it must result in a situation of cessation of work carried out by the employee(s) or a surplus of employees to carry out the particular job function. The issue is whether the work continues to exist or whether the work although continuing to exist requires fewer employees to carry it out. It is essential that it is the job functions and duties that are affected and not merely the job title or designation. If the same or essentially same work is found to be carried out under a different name or manner, there is no redundancy …" (See "*The Law on Dismissal*" by Nallini Pathmanathan, Siva Kumar Kanagasabi and Selvamalar Alagaratnam).

[18] In this case, the respondent therefore had the burden to prove on the balance of probabilities that the case for redundancy was made out so as to justify the dismissal of the appellant from its employment. Otherwise, it would tantamount to unfair labour practice, thereby rendering the dismissal invalid and without lawful excuse.

[19] The burden is on the employer to come to the court with concrete proof to establish that the employee is actually redundant, that he is discharged as surplus age to the company's requirement. There must be actual redundancy before a dismissal premised on the ground of redundancy could be grounded. Merely by showing that the company was undergoing restructuring exercise will not suffice. In order to bite, it must be further exhibited through evidence that the exercise had impacted on the job function in such a manner that "it was reduced to such an extent that he was considered redundant". In other words, the exercise had rendered the employee a surplus to the manpower requirement of the company. If such a situation is successfully borne out by the evidence as led before the court, then an employee so affected could be validly retrenched or his services terminated on that ground. (See the case of *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 CLJ 155). In determining dismissal based on redundancy, the court is entitled to look at the *bona fide* of the said move by the company.

[20] A perusal of the award shows that the learned CIC had considered the evidence led before her and that she had come to the conclusion that there was in fact, no redundancy so adversely affecting the job of the appellant in the company. Not only had she found that there was no redundancy, she had also found that there was a lack of *bona fide* on the part of the respondent when it decided to terminate the services of the appellant.

[21] Having found that the dismissal was not justified nor with valid excuse, the learned CIC had proceeded to consider the appropriate remedy to right an apparent wrong visited upon the appellant by the respondent. She concluded that reinstatement was not an appropriate order to make under the circumstances and she had thereby ordered that the appellant be paid back-wages amounting to RM193,000.

[22] The company being so aggrieved by the award had filed a JR application seeking for an order of *certiorari* to have the said award quashed and be set aside by the court.

[23] Before the learned HCJ, it was submitted by learned counsel for the respondent that the learned CIC was wrong in handing down the award that had struck down the dismissal of the appellant as being bad in law. In the main, the learned HCJ agreed with the company's complaint. She had gone on to reverse the award granted by the learned CIC and substituted the findings of fact made by her. She found as a matter of fact and as a matter of law that the dismissal of the appellant by the company was justified as there was in existence a redundancy situation that had adversely affected the appellant's job functions, thus his position in the company.

[24] Looking at the decision of the learned HCJ, we noted that the learned HCJ had spelt out the law on redundancy and she had cited the case of *Stephen Bong v. FCB (M) Sdn Bhd & Anor* [1999] 1 LNS 131; [1999] 3 MLJ 411 and concluded that just because the duties of the respondent continued to exist does not mean that there was no redundancy. At para. [5] of her grounds of judgment ("GOJ") she had quoted a portion of the decision of the court in the *Stephen Bong* case (*supra*) as follows:

> It is not the law that redundancy means the job or work no longer exists. Redundancy situations arise where the business requires fewer employees of whatever kind. The Industrial Court was right when it held that the applicant was redundant as there was reduced work and reduced business within the company which made the applicant's position as an executive director in charge of one of the groups redundant.

[25] It was her view that redundancy would happen in a business organisation when it "requires fewer employees to conduct the same amount of work or reduced amount of work". Based on that statement of the law as regards redundancy, the learned HCJ proceeded to apply the same to the factual matrix before her in the JR application. This was what she had said in the same para. [5] of the GOJ:

> It was the decision of the Industrial Court that there was no redundancy as the duties of the respondent still very much existed at the time of termination. With due respect, the fact that the duties of the respondent continued to exist does not mean that there was no redundancy.

[26] At the outset, we were of the considered view that there was nothing wrong with the learned HCJ's narration of the legal principle on what would amount in law to a redundancy situation. In fact, the position can be considered as trite. The law reports, as well as the body of literature on the subject-matter abound and would not require us to restate what the position is. It had boiled down to how the law was applied to the facts as unfolded through the evidence as led by the witnesses led by both parties.

[27] Premised as it were, on the law on redundancy, the learned HCJ had concluded at para. [10] in her GOJ as follows: A

> In this instance, there was evidence that nobody was appointed to replace the respondent and that his duties were taken over by the administrative department. This clearly shows that the respondent's duties and responsibilities were adequately performed by existing personnel which B goes to show that the respondent's position was no longer required and he was a surplus to the requirement of the applicant.

[28] This was where the learned HCJ had departed from the learned CIC as to whether there was in fact, as per the evidence adduced by both parties in the IC, a redundancy situation as envisaged by the law. C

[29] Before us, it was also contended by learned counsel for the appellant that the learned HCJ had erred when she interfered with the finding of facts made by the learned CIC. It was contended that the HCJ had overstepped her supervisory jurisdiction when she did that.

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[30] In this case, we observed that in departing from the findings of facts made by the learned CIC, the learned HCJ had concluded that "there was evidence that nobody was appointed to replace the respondent and that his duties were taken over by the administrative department". Based on this observation, the learned HCJ was of the view that such evidence had clearly shown that there was no longer any need to retain the appellant in the E company. In other words, the appellant had indeed become "a surplus to the requirement of the applicant".

[31] We must state here that the learned HCJ apart from making that conclusion, did not allude to any evidence that could amplify how the F learned CIC was in error when she came to her conclusion in coming to the award that she did. With respect, we had looked at the record of appeal, in particular, the notes of proceedings in the IC, and we were of the view that the learned CIC was justified in coming to the conclusions that she did. It needed to be borne in mind that the HC in a JR application exercises a supervisory function as opposed to its appellate functions. The scope of the G supervisory role is of a much narrow import as compared to the appellate role. While there is nothing wrong, *ipso facto*, for the HC to depart from the findings of facts made by the CIC, there is however, a huge caveat to be attached to that statement, as can be seen in the Federal Court case of *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 ("*Ranjit* H *Kaur* case"). The apex court there had occasion to say the following:

> The Federal Court, in *Petroleum National Berhad v. Nik Ramli* [2003] 4 CLJ 625, again held that the reviewing Court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. *Further, it was held that a* I *reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion*. (emphasis added)

[32] We had looked at the award of the learned CIC and with regard to her findings of facts pertaining to the crucial issue of whether the respondent had established the *factum* of redundancy, we noted that she had made the following findings, which appear in her GOJ. We now reproduce the same:

(1) The law recognised a company's right to organise its business in the manner it considers best. However, in doing so, the company must act *bona fide* and not capriciously or with motive of victimisation or unfair labour practice.

(2) The company did not adduce any evidence to substantiate its averment that it was operating under a very challenging set of circumstances at the material time when it was dealing with difficulties posed by the reduction in demand for its products, weak collection and escalating costs. On the contrary the company admitted that the claimant was paid a discretionary bonus of RM25,000.00 in 2001 in recognition of his services for that year. On the evidence, the company did not prove the alleged prevailing circumstances necessitating the company's retrenchment of the claimant's services.

(3) There was no evidence adduced that the claimant was not able to fulfil what was required of him at the time of his retrenchment. Further, that submission had no merit as COW1, for the company, had admitted under cross-examination that the claimant's performance was not an issue. That apart, the evidence adduced showed that a substantial amount of the claimant's duties and responsibilities still existed at the time of the claimant's retrenchment.

(4) Based on the evidence, the company's alleged retrenchment exercise was not *bona fide*. The claimant was fully aware of the company's direction which was also discussed in the company's senior executives' dialogue forum 2003. The company had offered VSS to four of its high ranking employees including the claimant and the claimant was paid RM60,000.00. The company had no reason to terminate the claimant's employment and the claimant was the only one retrenched. In the circumstances, the dismissal was clearly an unfair labour practice. It followed that a case of retrenchment had not been made out on a balance of probabilities. The company had not acted *bona fide* in the termination of the claimant's services.

[33] These findings were all based on the evidence of witnesses called by both parties as could be seen on the grounds of decision of the learned CIC. It would require some strong findings to the contrary to displace what the learned CIC found as having been proven and unproven, pertaining to the various allegations of facts, in order to upset and quash her award.

[34] From a perusal of the GOJ of the learned HCJ, we were unable to note how it had been exhibited therein that the learned CIC had erred in any of the manner, where curial intervention would be legally justified, as was reiterated by the Federal Court in the *Ranjit Kaur's* case (*supra*). To recap, the apex court had there said:

Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

[35] Neither had it been demonstrated in the GOJ of the learned HCJ that the award that was handed down by the learned CIC was unreasonable as understood in the context of the so-called *Wednesbury*'s unreasonableness test. Nor had it been articulated that the said award was such a perverse decision which no reasonable tribunal similarly circumstanced would have arrived at. We were of the view that the award of the learned CIC did not suffer from any of the defects identified by Lord Diplock in the *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374 and neither did it transgress the unreasonableness test as expounded by Lord Greene MR in the *Associated Provincial Picture House Ltd v. Wednesbury Corporation* [1948] 1 KB 223. Had it been so defective or unreasonable, we would have agreed with the learned HCJ that it was indeed an award ripe to be quashed by the issue of *certiorari*. But that had not been the case.

[36] In other words, it had not been shown in the GOJ of the learned HCJ how was the award handed down by the learned CIC is flawed in terms of its decision-making process. Merely because 'the reviewing judge might not have come to the same conclusion' would not constitute sufficient ground to impugn the award, as can be seen in the *Ranjit Kaur*'s case (*supra*).

[37] In the premise, we were of the considered view that there were merits in the complaints as submitted by learned counsel for the appellant against the decision of the learned HCJ when she issued the order of *certiorari* to quash the award handed down by the IC.

[38] Having considered the able submissions by both learned counsel, we were unanimous in allowing this appeal. We agreed with the CIC for reasons as forwarded by her in that there was no redundancy in the company of the respondent so as to justify his dismissal on the stated ground of redundancy. We also agreed with her that there was a lack of *bona fide* when the company dismissed the appellant. We also with respect, agreed with learned counsel for the appellant that the learned HCJ had exceeded her jurisdiction in quashing the award.

[39] For the above mentioned grounds, we had unanimously allowed the appeal with agreed costs of RM10,000 here and below. The High Court Judge's decision dated 9 September 2013 was therefore set aside and the IC's award dated 3 January 2013 was reinstated. We also ordered the deposit to be refunded to the appellant.